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SEC Guidance on Climate Change Disclosures

On Tuesday, February 2, 2010, the SEC released its Guidance Regarding Disclosures Related to Climate Change. In addition, in comments made by the Commission in connection with the adoption of the guidance, the SEC advised that it will be focusing on climate change disclosure in its reviews of company filings.

Starting on January 1, 2010, most large industrial concerns in the United States had to begin tracking the amount of greenhouse gases emitted by their businesses under new EPA requirements. According to the SEC, this and a number of current and anticipated state, national and international climate change initiatives led to its decision to clarify the obligation of public companies to disclose and discuss the potential impact of climate change activities in their public filings.

As a result, on January 27, the Commissioners, in a 3-2 vote, adopted the guidance, but delayed releasing the full text until February 2, 2010. The guidance was issued in response to a petition of several investors in 2007 (supplemented in 2008 and 2009) that sought from the SEC guidance as to how reporting companies should disclose the possibility of material effects from climate related events, legislation, regulation and international accords. The Commission also noted that it was concerned that a number of reporting companies were voluntarily providing climate change data to third parties (such as the Climate Registry or the Carbon Disclosure Project), and the Commission wanted to ensure that similar disclosures were made in SEC filings, if merited under SEC rules and regulations.

The guidance notes that the source of the reporting obligation to disclose material items related to climate change that might affect a reporting company is the Commission's existing Regulations S-K and S-X, as well as Securities Act Rule 408, and Exchange Act Rule 12b-20 (and, with respect to foreign private filers, Form 20-F's similar disclosure requirements). Hence, the guidance is being issued for clarification purposes, and does not, in the Commission's view, represent new obligations for reporting companies. Nonetheless, the guidance provides a roadmap as to which sections within a report climate change implications should be considered.

At the outset, with respect to the discussion in the Management's Discussion and Analysis section of any filing (MD&A), the guidance reiterates that the standard to apply with respect to the "reasonable likelihood" that some event or uncertainty may have a material effect on the reporting company is a lower threshold than "more likely than not." The Commission, however, presents this standard in the negative. That is, if a known trend, event or uncertainty, including the possible passage of pending legislation or additional regulation, cannot be excluded as not reasonably likely to occur, then management must evaluate the consequences of the known trend, event or uncertainty on the financial condition or results of operations of the reporting company **on the assumption that it will come to fruition**. For example, unless a company can conclude that it is no longer reasonably likely that cap and trade legislation or regulation, either at the state or federal level, will come to pass within a relevant timeframe, then management must evaluate the potential consequences on the reporting company as if the

legislation or regulation will come into effect when determining if the impact would likely be material. Nonetheless, management may still determine that such legislation or regulation, if enacted, would not have a material impact on the reporting company, and thus choose to exclude a discussion of its impact on the reporting company.

The SEC then presents several examples of climate change related issues which may warrant disclosure, and the regulatory basis for such disclosures and the relevant section of a filing in which such disclosures may be made.

The table below reflects some of these examples:

Item	Rule or Regulation	Where disclosed and examples of possible disclosures
Impact of Legislation and Regulation	Item 101, Reg. S-K	<u>Description of the Business</u> : the material estimated capital expenditures for environmental control facilities.
	Item 103, Reg. S-K	<u>Legal Proceedings</u> : disclosure of either pending lawsuits or governmental actions to which the reporting company or its property is subject, or similar actions contemplated by a governmental entity, if: <ul style="list-style-type: none"> • The proceeding is material to its business or financial condition, • Involves a claim for damages or would involve an expenditure in excess of 10% of the current assets, or • A governmental entity is a party unless the monetary effect will be reasonably less than \$100,000.
	Item 303, Reg. S-K	<u>MD&A</u> : discussion of known uncertainty of pending legislation or regulation and potential material impact on reporting company (positive or negative) including: <ul style="list-style-type: none"> • purchase and sale of allowances, • improvements needed to facilities to comply, • effect on the demand and supply of goods produced, and • effect on supply chain.
	Item 503(c), Reg. S-K	<u>Risk Factors</u> : Specific risks faced by the reporting company that are not similar to all reporting companies, such as energy sector companies, or companies that rely on products that emit greenhouse gases.
International Accords	Reg S-K	Discussion in the <u>Description of the Business</u> , <u>Legal Proceedings</u> , <u>MD&A</u> and <u>Risk Factors</u> sections of the relevant filings similar to the those that would be applicable from pending domestic legislation or regulation.
Indirect Consequences from Regulation or Business Trends	Item 101, Reg. S-K	<u>Description of Business</u> : plans to reposition the company to take advantage of such trends or regulation through material acquisitions.

	Item 303, Reg. S-K	<u>MD&A</u> : New opportunities or risks such as: <ul style="list-style-type: none"> decreased demand for goods producing greenhouse gases increased competition to innovate decreased demand for services related to hydrocarbon extractive industries.
	Item 503(c), Reg. S-K	<u>Risk Factors</u> : impact on a reporting company's reputation, if its business is sensitive to public opinion.
Physical Impacts of Climate Change	Item 101; Reg. S-K	<u>Description of Business</u> : disruptions to operations or destruction of property due to severe weather or coastal locations.
	Item 303, Reg. S-K	<u>MD&A</u> : potential disruptions in supply chain due to increased severe weather activities or decreased agricultural production in drought-affected areas.
	Item 503(c), Reg. S-K	<u>Risk Factors</u> : increased insurance claims and liabilities for insurance and reinsurance companies.

By virtue of its guidance, the SEC has clarified its position that reporting companies need to consider climate change, and possible legal, legislative and regulatory responses to the perception of climate change, as subjects to be discussed in their disclosure committees and by management in connection with all future relevant filings, such as registration statements and periodic reports, to which such disclosures may apply.

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